BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JOHN E. GIROU, JR.)
Claimant)
VS.)
) Docket No. 1,003,079
TEC ENGINEERING)
Respondent)
AND)
)
VALLEY FORGE INSURANCE COMPANY)
Insurance Carrier)

ORDER

Claimant appealed the May 29, 2002 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

This is a claim for a December 21, 2001 accident and injuries to the back, right leg, elbow and chest. In the May 29, 2002 preliminary hearing Order, Judge Frobish determined that claimant's accident did not arise out of and in the course of employment and, therefore, denied claimant's request for workers compensation benefits.

Claimant appealed the preliminary hearing Order to this Board for review. But, despite being requested, claimant has failed to brief the issues, leaving the Board without the benefit of claimant's analysis of the facts and applicable law. On the other hand, respondent and its insurance carrier briefed the issues for the Board and contend the preliminary hearing Order should be affirmed as claimant has failed to prove his accident arose out of and in the course of employment.

The only issue before the Board on this review is whether claimant's December 21, 2001 accident arose out of and in the course of employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

Claimant was injured on December 21, 2001, when he fell through some wooden planks on a fire escape. The Judge determined that claimant's accident did not occur on the premises rented by respondent and the Board agrees. The greater weight of the evidence indicates the fire escape was not on the premises rented or maintained by respondent. Moreover, the fire escape was located off a common hallway that was used by other tenants in the building.

The Judge also determined that claimant's accident occurred after he left respondent's premises for a smoke break. The Board agrees. On the morning of the accident, claimant and coworker Kelly Stamper entered the building together, went to their offices, set their belongings down, and immediately went to the fire escape to smoke a cigarette before beginning work.

The Board concludes that at the time of the accident claimant had not assumed the duties of his employment, was not engaged in an activity incidental to his employment with respondent, and was not on respondent's premises when he was injured. Accordingly, claimant's accident did not arise out of and in the course of employment. The May 29, 2002 preliminary hearing Order should be affirmed.

WHEREFORE, the Board affirms the May 29, 2002 preliminary hearing Order.

IT IS SO ORDERED.
Dated this day of August 2002.
BOARD MEMBER

Joseph Seiwert, Attorney for Claimant
D. Steven Marsh, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation